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COURT OF APPEALS
DIVISION II

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No. 42410-0-II
STATE OF WASHINGTON
BY [Signature]
DEPUTY

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

CHRISTOPHER ROBIN BRIEJER

Petitioner.

PERSONAL RESTRAINT PETITION

Pierce County Superior Court Cause #09-1-04740-7

Lance M. Hester
WSB #27813

HESTER LAW GROUP, INC., P.S.
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I. STATEMENT OF THE CASE

A. Procedural History

Petitioner has previously filed a direct appeal under Division II Case No. 40912-7-II. Filed concomitantly with this PRP is a motion to consolidate Petitioner's PRP with his direct appeal.

To avoid repetition and for brevity purposes, Petitioner asks the court to reverence the procedural and case facts in his opening brief in the above referenced direct appeal.

Accordingly, Petitioner offers no additional narrative supporting his Procedural History.

B. Facts

In addition to those facts referenced in the opening brief of his direct appeal, for purposes of this PRP, Petitioner offers the following facts.

During the course of trial, the state presented medical records, Mr. Briejer's driver's license, handwriting analysis indicating Mr. Briejer negotiated all of the checks at issue, and witnesses who wrote other checks Mr. Briejer received. See, Id. at 109, 122, 130, 161, 171-72, RP (6/9/10) 4, 12, 23, 36, 37, 42, 43.

The state also called Ph.D, Dr. Allan Tencer as an expert witness. Dr. Tencer's testimony has been excluded from many civil trials. See, Exhibits A - I. Dr. Tencer is typically offered by the defense in personal injury cases to opine, as an engineer, about issues of force. However, because his testimony tends to ultimately address medical issues, his testimony has proven repeatedly objectionable. In other words, many Superior Court judges have concluded that, because Dr. Tencer is not a medical doctor, he is unqualified to offer medical testimony and he cannot cloak his engineering opinions as such.

Nonetheless, at Mr. Briejer's trial, Dr. Tencer offered what came across as a medical opinion: that Mr. Briejer's spine was impacted with nearly the same force as his foot when he fell from the scaffolding. Id. at

59-75. He went on to say that the amount of force involved in Mr. Briejer's fall "can cause damage to the spine." Id. at 75. When asked if it can cause the disc herniation, he replied that the disc herniation would generally be a combination of this compression and excessive bending as one lands. Id. He called this "the makings of a disc injury." Id. This opinion was offered in spite of the fact that Dr. Tencer had never examined Mr. Briejer.

Despite Dr. Tencer's controversial status as an expert and his obvious medical testimony, defense counsel never moved to have his testimony excluded. Id. at 48.

After the prosecution rested, the defense did not put on a case in chief. Id. at 98. The parties made their closing arguments. Id. at 108-149. After deliberations, the jury returned guilty verdicts on all but one of the 57 counts. Id. at 160-170. CP 178-234.

Mr. Briejer was ultimately sentenced to 43 months, the low end of his standard range sentence. RP (7/19/10) 28.

II. ARGUMENT

A. COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE TO EXCLUDE THE TESTIMONY OF DR. TENCER.

Both the Sixth Amendment to the United States Constitution and Art. I § 22 (amendment 10) of the Washington State Constitution guarantee the right to effective assistance of counsel in criminal proceedings. Strickland v. Washington, 466 U.S. 668, 684-86, 104 S. Ct.

2052, 80 L.ED.2d 674 (1984), State v. Hendrickson, 129 Wn. 2d 61, 77, 917 P.2d 563 (1996). Counsel is ineffective when his or her performance falls below an objective standard of reasonableness and the defendant thereby suffers prejudice. Strickland, 466 U.S. at 687-88. Prejudice is established when “there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.” Hendrickson, 129 Wn.2d at 78 (*citing* State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)). A “reasonable probability” is a probability “sufficient to undermine confidence in the outcome.” State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987).

1. Defense counsel was ineffective for failing to move to suppress the testimony of Ph.D. Dr. Allen Tencer as an expert witness.

Defense counsel should have moved to suppress the testimony of Dr. Tencer because he is not a medical doctor and as such, should not have been allowed to give medical opinions as to whether Mr. Briejer’s fall from the ladder was the cause of his re-aggravated back injury.

In Doherty v. Municipality of Metropolitan Seattle, 83 Wn.App. 464, 921 P.2d 1098 (1996), the Court of Appeals held that a biomechanical engineer could not testify as to causation. Id. See Miller v. Staton, 58 Wn.2d 879, 365 P.2d 333(1961) (holding that “the causal relationship of an accident or injury to a resulting physical condition must be established by medical testimony beyond speculation and conjecture.”).

Here, the State called Dr. Allen Tencer to testify that – because the force of Mr. Briejer’s fall injured Mr. Briejer’s ankle – the force involved also must have been the cause of Mr. Briejer’s disc herniation. RP (6/9/2010) 75. This conclusion followed twenty-seven pages of transcripts where Dr. Tencer – without any foundational evidence suggesting medical expertise – discussed human anatomy, orthopedics and opined about Mr. Briejer’s medical records without any objection from the defense. Id. at 48-75.

As noted above, this testimony was consistent with Dr. Tencer’s typical “expert” testimony – as Dr. Tencer is a well-known defense witness in *personal injury* actions.

As such, even a cursory investigation into Dr. Tencer’s background would have exposed defense counsel to Tencer’s background and assisted with excluding his testimony. Counsel, on the other hand, failed to so much as interview Dr. Tencer during trial preparations. Tencer’s CV shed enough light on his background as a defense witness in personal injury actions to give the defense substantial information to draw from – had it actually examined even the background cited in the CV.

For example, a review of the Washington State Association for Justice¹ Webpage reveals that numerous resources exist for lawyers

¹ The Washington State Association for Justice – formerly known as the Washington State Trial Lawyer’s Association – is

attempting to exclude Dr. Tencer from testifying about accidents and subsequent resulting injuries – including many of the Court Orders attached to this brief. See Affidavit of Attorney Lance Hester. Many of these Orders state that Dr. Tencer cannot testify in personal injury actions because mechanical engineers are not medical doctors and thus, they cannot be allowed to opine as to whether an accident caused an injury. See Exhibits A - I).

In Ball v. Allstate Insurance Company, Case # 98-2-04376-0 (1999) (attached as Exhibit A), the Honorable Vicki Hogan excluded Dr. Tencer's testimony at trial. In that case, Defendant Allstate sought to offer Dr. Tencer's opinion "as to the extent of injury sustained by the Plaintiff from a biomechanical rather than from a medical point of view." Id. at 1. The Court concluded that "the extent of injuries sustained by the Plaintiff presents a medical question at trial, and ... there is no evidence before the Court of the general acceptance of the reliability of the type of matter and opinion to be offered by Dr. Allan Tencer." Id.

Roughly ten years later, in Zweber v. Cavatappi Distribuzione LTD, Case # 08-2-34906-3 SEA (2009) (attached as Exhibit B), the Honorable Douglass A. North ordered Dr. Tencer excluded from trial because his testimony would be "logically irrelevant to the issue the jury must decide: the degree to which this particular plaintiff was injured in

Washington's most prominent association for plaintiff's trial lawyers.

this particular [accident].” Id. at 2. In reaching that decision, Judge North wrote:

Dr. Tencer is very careful to state that he is not testifying to what specific injuries the accident caused to this plaintiff. But that is exactly the inference that the defense wants the jury to draw from his testimony: that because, on average, the forces in such an accident would not injure a vehicle occupant, the plaintiff in this case must not have been injured by this accident. If the jury does not draw this inference, Dr. Tencer’s testimony, while interesting, is irrelevant to the proceeding before the court.

Id.

This was exactly the same conclusion that Dr. Tencer reached in Mr. Briejer’s trial: that on average, the forces necessary to shatter a person’s ankle would also cause Mr. Briejer’s disc herniation injury. RP (6/9/2010) 72-73. Because this type of testimony has been barred in numerous trial courts throughout Washington (see Exhibits A – I) and such information is readily available to attorneys potentially confronted with testimony from Dr. Tencer, defense counsel was ineffective for not attempting to have his testimony excluded.

Importantly, the attached Court Orders forbidding the testimony of Dr. Tencer all stem from civil personal injury lawsuits. While the standard for expert witnesses in a civil case is no different from those in criminal cases, it is necessary to point out that our system strains to protect the rights of criminal defendants. If a witness like Dr. Tencer is routinely forbidden from testifying against plaintiffs in civil cases, this Court should have grave concerns about his testimony against criminal defendants – especially when he is able to testify without objection from

defense counsel. For these reasons, counsel was ineffective for failing to seek Dr. Tencer's exclusion from trial.

2. Mr. Briejer would not have been convicted but for the testimony of Dr. Tencer.

The second prong of the Strickland test requires a defendant alleging ineffective assistance of counsel to show that, but for counsel's errors, the results at trial would have been different.

First, and perhaps most importantly, in Mr. Briejer's trial, counsel put up no defense case. This indicates that defense counsel believed the State was failing to meet its burden of proving the case against Mr. Briejer beyond a reasonable doubt. Without the testimony of Dr. Tencer, the State would have had even less evidence.

Second, the testimony of Dr. Tencer was particularly damning. Dr. Tencer offered the opinion that Mr. Briejer's spine was impacted with nearly the same force as his foot when he fell from the scaffolding. Id. at 59-75. When asked if it can cause the disc herniation, he replied that the disc herniation would generally be a combination of this compression and excessive bending as one lands. Id. He called this "the makings of a disc injury." Id.

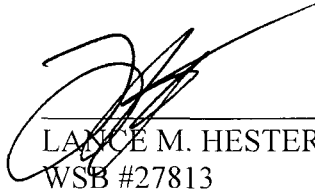
As stated, this conclusion by Dr. Tencer followed twenty-seven pages of transcripts where Dr. Tencer – despite having no medical training – discussed human anatomy, orthopedics and opined about Mr. Briejer's medical records before ultimately concluding that the fall from the ladder surely caused the spine injury. RP (6/9/2010) 48-75.

Respectfully, there can be no doubt that this testimony was critical to the State's presentation of its case and affected the outcome of trial.

III. CONCLUSION

For the reasons cited above and the authority referenced herein, the court should reverse Mr. Briejer's conviction.

Respectfully submitted this 27 day of July, 2011.



LANCE M. HESTER
WSB #27813

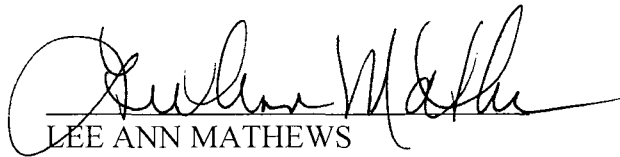
CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the personal restraint petition brief to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Susan Sackett DanPullo
Assistant Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

Christopher R. Briejer
DOC #342166
Cedar Creek Corrections Center
P.O. Box 37
Little Rock WA 98556

Signed at Tacoma, Washington, this 27th day of July, 2011.


LEE ANN MATHEWS

COPY



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

DENISE BALL,

Plaintiff,

vs.

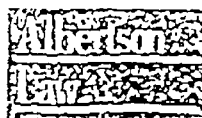
ALLSTATE INSURANCE COMPANY,
a foreign insurer

Defendant.

NO.: 98-2-04378-0

ORDER GRANTING PLAINTIFF'S
MOTION IN LIMINE EXCLUDING
TESTIMONY OF ALLAN TENCER

THIS MATTER having come before the Court upon the motion of the Plaintiff, DENISE M. BALL, by and through her attorney, DAN M. ALBERTSON, the Defendant represented by its attorney, ROBERT RICHARDS, and the Court having considered the argument of counsel and the record and file herein, and the Court finding that Defendant ALLSTATE INSURANCE COMPANY intends to offer the opinion of Dr. Allan Tencer at trial as to the extent of injury sustained by the Plaintiff from a biomechanical rather than from a medical point of view, and the Court further finding the extent of injuries sustained by the Plaintiff presents a medical question at trial, and the Court further finding that there is no evidence before the Court of the general acceptance of the reliability of the type of matter and opinion to be offered by Dr. Allan Tencer, and the Court being unable to find that Dr. Allan Tencer's opinion to be offered herein is reliable, now, therefore, it



Dan M. Albertson
701 Pacific Avenue

EXHIBIT

A

is

ORDERED that the Plaintiff's motion to exclude the testimony of
Allan Tencer at trial be and the same is hereby granted.

DONE IN OPEN COURT this 5TH day of FEBRUARY, 1999.

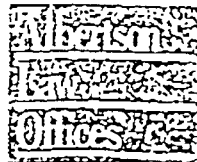
15/ ROSANNE BUCKNER
JUDGE ROSANNE BUCKNER

Presented by:

15/
DAN M. ALBERTSON, WSBA #10962
Attorney for Plaintiff

Approved as to form:

14/
ROBERT RICHARDS, WSBA # 27596
Attorney for Defendant



Received

JUN 17 2010

Phillips & Webster

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

LINN ZWEBER,

Plaintiff,

v.

CAVATAPPI DISTRIBUZIONE LTD,

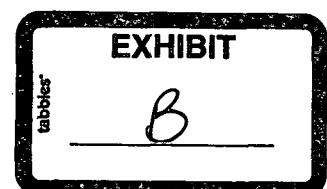
Defendant.

No. 08-2-34906-3 SEA

MEMORANDUM DECISION AND
ORDER ON MOTION TO EXCLUDE
ALAN F. TENCER, PH.D.

This matter, came before the Court on Plaintiff's motion to exclude the testimony of Allan Tencer, Ph.D., the Court, having heard the argument of counsel and having considered the pleadings and files herein as well as the following:

1. Plaintiff's Motion to Exclude Testimony of Allan Tencer, Ph.D.;
2. Declaration of Derek P. Radtke, with attached Exhibits;
3. Defendant's Response to Motion to Exclude Testimony of Allan Tencer, Ph.D.;
4. Declaration of Arthur Leritz in Support of Motion to Exclude Testimony of Allan Tencer, Ph.D., with attached Exhibits;
5. Declaration of Allan Tencer, Ph.D., with attached Exhibits;
6. Plaintiff's Reply on Motion to Exclude Allan Tencer, Ph.D.



The Court issues the following Memorandum Decision:

The court grants the motion to exclude the testimony of Dr. Tencer because it is logically irrelevant to the issue the jury must decide: the degree to which this particular plaintiff was injured in this particular automobile crash.

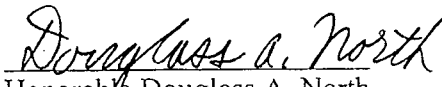
Dr. Tencer is clearly a very well qualified expert in biomechanics. It appears that his work is generally accepted in understanding the forces on the human body in an auto crash and the design of vehicles and safety restraint systems. This work is very useful in understanding the average forces on the human body and how best to minimize injuries in auto crashes.

But the issue before the jury is not the average force on a human body which results from a crash at a certain speed between vehicles of specific weights. For an analogous ruling see the Washington Supreme Court's rejection of a reduction in the amount awarded for occupationally caused hearing loss based upon the average amount of age-related hearing loss that a worker of that age would experience, Boeing Co. v. Heidy, 147 Wn.2d 78, 51 P.3d 793 (2002).

Dr. Tencer is very careful to state that he is not testifying to what specific injuries the accident caused to this plaintiff. But that is exactly the inference that the defense wants the jury to draw from his testimony: that because, on average, the forces in such an accident would not injure a vehicle occupant, the plaintiff in this case must not have been injured by this accident. If the jury does not draw this inference, Dr. Tencer's testimony, while interesting, is irrelevant to the proceeding before the court.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's motion to exclude the testimony of Allan Tencer, Ph.D. is GRANTED. Allan Tencer's testimony is excluded.

Entered this 15TH day of JUNE 2009.


Honorable Douglass A. North

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF KING

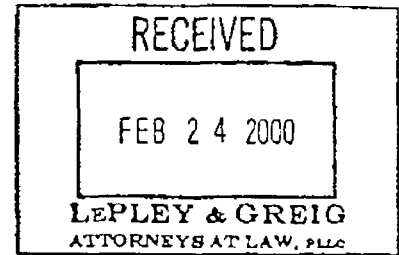
3 ROSEMARY HEDSTROM, et al.,) 98-2-23125-4 SEA

4 Plaintiffs,)

5 vs.)

6 PAUL DUNBAR,)

7 Defendant.)



8
9 REPORT OF PROCEEDINGS

10 before the Honorable SUZANNE M. BARNETT, Judge,
11 presiding on January 27, 2000.

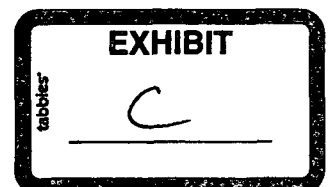
12 RULING.

13 APPEARANCES:

14 For the Plaintiff: RICHARD HILFER, Esq.

15
16 For the Defendant: JOHN MATTHEWS, Esq.

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23 REPORTED BY
24 J. Dan Lavielle, RPR
25 Official Court Reporter
State of Washington



1 THE COURT: Before the jury comes in, let me
2 give you the long-awaited decision with regard to --
3 I've given you the decision already.

4 With regard to plaintiff's motion in limine,
5 the plaintiff moves to exclude testimony of Dr.
6 Tencer, and what the court considered in making its
7 ruling was the plaintiff's memorandum, Dr. Tencer's
8 report and an article from some journal entitled
9 Spine, provided by the plaintiff, and I'm not familiar
10 with that journal or its weight or academic prowess,
11 if you will, but I did read it. I didn't give it a
12 lot of weight.

13 So Mr. Moebes' reported case authority
14 including the out-of-state authority cited by Mr.
15 Hilfer, I realize those don't have in precedential
16 value, certainly not controlling on this court, but
17 noncontrolling authorities can be instructive in their
18 analysis and reasoning.

19 The defendant responded and provided a
20 transcript of Dr. Tencer's deposition, which was made
21 a part of record and I reviewed that.

22 I excluded from consideration pleadings and
23 orders submitted by the plaintiff, and submitted
24 supplementally by the plaintiff continually, signed by
25 other courts. Unreported decisions, in other words,

1 those were not considered.

2 And I excluded the Northwest litigation
3 printout provided by the defendant which indicated the
4 number of times and places that Dr. Tencer has
5 testified and I did not consider the Redmond
6 declaration.

7 Defendant retained Dr. Alan Tencer, PhD,
8 whose PhD is in mechanical engineering.

9 Dr. Tencer reviewed photographs of the
10 plaintiff's car, car repair cost estimates, a summary
11 of plaintiff's deposition and some of plaintiff's
12 medical records.

13 The plaintiff argued that this expert
14 testimony would not meet the Frye test and should be
15 excluded.

16 The plaintiff also objected to Dr. Tencer
17 offering any medical opinion as he is not a medical
18 expert, not a physician, and the plaintiff pointed out
19 that it's his belief, plaintiff's counsel's belief
20 that there are significant meteorologic flaws in the
21 analysis of Dr. Tencer.

22 In the defendant's response, the defendant
23 asserts Dr. Tencer is very well qualified, he is a
24 PhD in mechanical engineering, he is a professor in
25 the orthopedic department of the University of

1 Washington Medical School, he teaches biomechanics,
2 and he is the director of a biomechanics lab at Harbor
3 View Hospital. He has written articles on
4 biomechanics and the biomechanics of cervical spine
5 trauma in motor vehicle accidents, and he focuses his
6 research on whiplash.

7 Defendant argued that Dr. Tencer's testimony
8 meets the Reefer standard and that the Supreme Court
9 case in this state which essentially refers us back to
10 evidence rule 702 and 703. The defendant argues that
11 because Dr. Tencer's scientific evidence is not novel
12 that the Frye standard should not apply.

13 In any event, the defendant argues Dr.
14 Tencer's evidence is based upon application of an
15 accepted theory or methodology to a particular medical
16 condition.

17 The defendant conceded that Dr. Tencer would
18 not be called to render a medical opinion but would be
19 called to express a biomechanical opinion.

20 Both parties analyzed the standard set forth
21 in Frye versus the United States, 1923 United States
22 Supreme Court case. It has been sort of the watchword
23 in the area of admissibility of scientific evidence
24 since it was published in 1923.

25 The Federal Rules of Evidence were adopted

1 after the Frye opinion and the issue has been most
2 recently and probably most coherently addressed in
3 this state in the Reeve case, Reeve versus Stroh.

4 In the Reeve case the Court of Appeals
5 concluded that Frye, the Frye analysis applies to
6 criminal cases in Washington but that the standard in
7 civil cases is delineated in the Supreme Court case of
8 Daubert versus Merrill-Dow Pharmaceutical, 1993 case.

9 Our Supreme Court in 1995 granted cert and
10 decided the Reeve case.

11 In the Supreme Court's opinion in Reeve, the
12 Supreme Court of Washington reaffirmed that Frye is
13 still applicable in Washington in cases in which novel
14 scientific evidence is at issue.

15 The court declined, however, to adopt the
16 Daubert test for admissibility of scientific evidence
17 in the Reeve case and left open some questions about
18 whether it would be applicable in other civil
19 contexts.

20 I'm quoting now from page 308 of the Reeve
21 opinion, while we acknowledge the invitation to adopt
22 the federal test for reliability under Federal Rule of
23 Evidence 702 as outlined in Daubert, we decline to do
24 so in this case and find that the issues here are
25 fully resolvable under the state's evidence rules and

1 the cases interpreting them.

2 Frankly, I'm inclined to agree with Justice
3 Johnson's concurring opinion when he says the majority
4 reaches the correct results in this case but if
5 approached is of no precedential value and offers no
6 help for the parties and court faced with similar
7 problems. That's from page 310 of the same opinion.

8 In fact, further litigation on this point
9 seems inevitable, that is pointed out by Karl Teglund
10 in his various, very persuasive and reliable courtroom
11 evidence handbook.

12 The Supreme Court specifically said it did
13 not adopt Daubert for this case, meaning the Reefer
14 case, and gave us for guidance for when or if Daubert
15 should be applied or adopted. The concurring opinions,
16 and I'm sure counsel are well aware, urged adoption of
17 the Daubert standard in civil cases but that has not
18 been done as of yet.

19 What happened is that all authorities
20 regarding admissibility of scientific evidence in this
21 state seem to point back to evidence rule 702 as a
22 starting point.

23 Analyzing the question of Dr. Tencer's
24 testimony in this case I revert, likewise, to that rule.
25 I agree with the defendant that biomechanics and force

1 and impact studies are not novel science, therefore, I
2 don't think the Frye standard applies. I think in my
3 oral ruling initially I made reference to Frye but I
4 do think that there is a question, there are questions
5 under evidence rule 702 this court must ask.

6 First of all, I'll refer to the rule
7 directly, if scientific, technical, or other specialized
8 knowledge would assist the trier of fact to understand
9 the evidence or to determine a fact in issue, then a
10 qualified witness may testify and render an opinion
11 with regard to that evidence.

12 The first part of that analysis, whether
13 scientific, technical, or other specialized knowledge
14 will assist the trier of fact has to mean that the
15 subject matter is beyond the common understanding of a
16 juror.

17 So my first determination is whether this
18 evidence would be helpful to the jury. I will grant
19 that biomechanics is technically probably beyond the
20 kin of nonengineers. I don't understand biomechanics,
21 I couldn't figure a problem if my life depended on it,
22 but I don't believe fender-benders of the amount of a
23 jolt you get when you back into a post in a parking
24 garage or someone runs into you or you run into
25 someone else at a street corner is beyond common

1 understanding.

2 Further, after a thorough review of the
3 opinion of Dr. Tencer and his deposition, it appears
4 to be based upon a circle of speculation and estimates
5 that do not appear to support his opinion or his
6 conclusion. This is not a determination Dr. Tencer is
7 not a qualified biomechanical expert, no question that
8 he is. It's not a determination that research or
9 science in the area of biomechanics is junk science, I
10 don't believe it is.

11 Rather it is a determination that the
12 conclusions in Dr. Tencer's report in this case appear
13 to be based on some sort of circular logic and
14 insufficient factual basis.

15 I marked some passages in his deposition, so
16 if I know the weight of the cars and I estimate an
17 approach, how fast, in this case, the Jeep is coming,
18 I know the weight of the Jeep, I know the weight of
19 the Cadillac, I know what the bumpers do, then I can
20 estimate the speed at which the Cadillac would respond
21 when it's hit.

22 Reading through some more of his testimony at
23 deposition he further says, well, I start by guessing
24 how fast the Jeep is going then I do the calculation
25 then I determine how fast the Jeep is going.

1 Well, you can't begin and end at the same
2 point and come up with any kind of analysis that is
3 going to be helpful for a jury in this area.

4 Furthermore, his report is deficient because
5 he assumed the speed of the Jeep without any evidence,
6 without any external extrinsic evidence.

7 He assumed that the Jeep had no damage
8 without observing either the vehicle or a photograph
9 of the vehicle.

10 He assumed the Cadillac damage was minimal
11 based upon -- and this is not a far-fetched
12 assumption, based upon the photographs and the repair
13 estimates.

14 He assumed that the plaintiff reacted to the
15 crash the same as a crash-test dummy might react for
16 a statistical female in her age group, and I think
17 those, frankly, are just assumptions that render his
18 opinion too tenuous to be instructive to the jury on
19 the issue of causation.

20 I also had to look at relevance and I suppose
21 these decisions are in the sound discretion of the
22 trial judge and I suppose there can be a fairly strong
23 argument made and I think Mr. Matthews has made it
24 that Dr. Tencer is an appropriate expert to have him
25 testify but I also have to look at whether otherwise

1 relevant evidence is admissible under the rules, 400
2 rules, whether it might be prejudicial and, frankly, I
3 think to allow Dr. Tencer to testify on all of those
4 tenuous grounds would not have been helpful to the
5 jury.

6 I also think to allow him to testify would
7 have lent an air of authority to his conclusion that
8 it didn't otherwise deserve and might, in fact, tends
9 to confuse or sway the jury unnecessarily, and for
10 those reasons I ruled the way I did.

11 I apologize for taking so long to get that
12 reasoning to you, I hope that is clear.

13 (End of order)

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25

FILED IN COURT BOOK
2/16 2000
PAM L. DEWITT
COUNTY CLERK
By *DeWitt*
Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

LYNNETTE MARIE PANICHI and
TIMOTHY PANICHI, husband and wife,
and MARIELLE LYNÆ REEVES, a minor
by and through her guardian ad litem,
LYNNETTE PANICHI, and AMANDA
CHRISTINE REEVES, a minor by and
through her guardian ad litem, LYNNETTE
PANICHI,

Plaintiffs,

vs.

JOHN UNTERREINER and JANE DOE
UNTERREINER, husband and wife and the
marital community composed thereof,

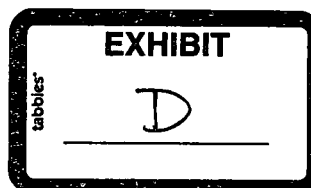
Defendants.

NO. 97-2-06664-4

ORDER GRANTING
PLAINTIFF'S MOTION IN
LIMINE EXCLUDING
TESTIMONY OF ALLAN
TENCER

THIS MATTER having come before the Court upon the motion of the Plaintiffs herein,
by and through their attorney, David C. Sweetwood, the Defendant being represented by his
attorney, Gregory Wordon, and the Court having considered the argument of counsel and the
record and file herein, and the Court finding that Defendant Unterreiner intends to offer the
opinion of Dr. Allan Tencer at trial as to the extent of injury sustained by the plaintiffs from
a biomechanical rather than from a medical point of view, and the Court further finding the
extent of the injuries sustained by the plaintiffs presents a medical question at trial, and the
Court further finding that there is no evidence before the Court of the general acceptance of the

ORDER EXCLUDING TESTIMONY
OF ALLAN TENCER, PG. 1



David C. Sweetwood
Attorney at Law
2925 Rockefeller
Everett, Washington 98201
(206) 471-1171

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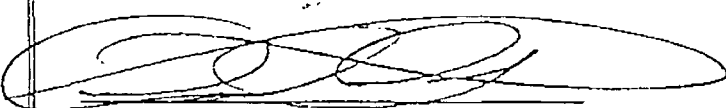
1
2
3 reliability of the type of matter and opinion to be offered by Dr. Allan Tencer, and the Court
4 being unable to find that Dr. Allan Tencer's opinion to be offered herein is reliable, now,
5 therefore, it

6 ORDERED that the Plaintiff's motion to exclude the testimony of Allan Tencer at trial
7 be and the same is hereby granted.
8

9 DONE IN OPEN COURT this 16th day of February, 2000.

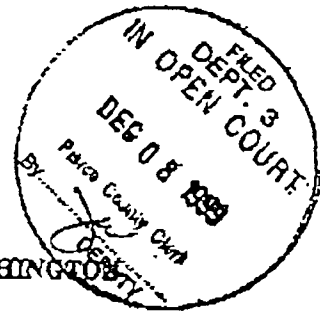
10
11 
12 JUDGE ANITA FARRIS

13 Presented by:

14
15 
16 DAVID C. SWEETWOOD, WSB#7500
17 Attorney for Plaintiffs
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28 ORDER EXCLUDING TESTIMONY
OF ALLAN TENCER, PG. 2

David C. Sweetwood
Attorney at Law
2925 Rockefeller
Everett, Washington 98201
(425) 258-4676



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

DONNA L. BOGUE and BRADLEY E.
BOGUE, wife and husband,

Plaintiffs,

vs.

TOBY KARABINOS and "JANE DOE"
KARABINOS, husband and wife; and
AMERICAN PIZZA CORPORATION, a
Washington corporation, dba PIZZA TIME.

Defendants.

NO: 97-2-11544-8

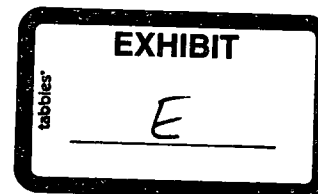
ORDER GRANTING PLAINTIFF'S
MOTION IN LIMINE
EXCLUDING TESTIMONY OF
OF ALLEN TENCER

THIS MATTER having come on before the undersigned Judge of the above-entitled Court upon the motion of the Plaintiff for an order in limine, and the Court having heard the motion, reviewed the authorities and heard the argument of counsel, and being fully advised in the premises, it is hereby ORDERED as follows:

1. No mention, comment, question, argument or other reference whatsoever should be made by Dr. Allan Tencer as to whether or not the forces generated by the May 7, 1996 automobile accident were sufficient to cause injuries to Plaintiff, Donna Bogue;

ORDER GRANTING MOTION TO EXCLUDE
TESTIMONY OF ALLEN TENCER -1-

LAW OFFICES OF
Charles James Brocato
3000 MARSHWORTH DRIVE
9201 WABOR, WASHINGTON 98001
TEL: 206-851-8184 • FAX: 206-851-8183



2. No mention, comment, question, argument or other reference whatsoever should be made by Dr. Allan Tencer as to whether the Plaintiff suffered neck and back injuries in the May 7, 1996 motor vehicle accident:

3. No mention, comment, question, argument or other reference whatsoever should be made by Dr. Allan Tencer as to whether or not the forces generated by the May 7, 1996 motor vehicle accident was sufficient to cause injuries to any other person.

DATED this 9 day of Dec November, 1999.

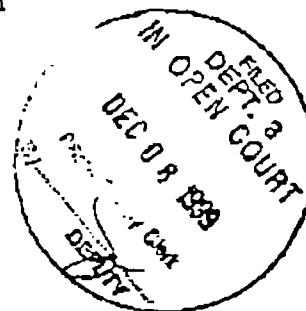
TH P. Larkin
Judge Thomas P. Larkin

Presented by:

Charles J. Brocato
Charles J. Brocato, WSB #3855
Attorney for Plaintiff

Approved as to form; notice of presentation waived:

Brian M. Wieburg
Brian M. Wieburg, WSB #22353
Attorney for Defendants Karabinos



ORDER GRANTING MOTION TO EXCLUDE
TESTIMONY OF ALLEN TENCER -2-

LAW OFFICES OF
Charles James Brocato
3425 HARBORVIEW DRIVE
DIX HARBOR, WASHINGTON 98232
(206) 361-8700 • (206) 361-0577
FAX (206) 361-0577

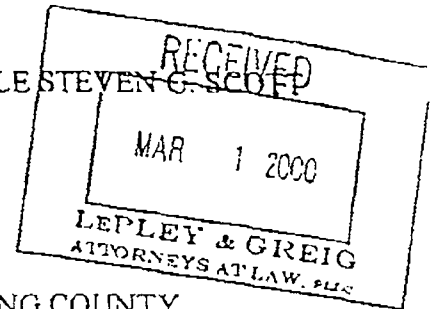
FILED

KING COUNTY, WASHINGTON

NOV 08 1999

SUPERIOR COURT CLERK
BY PAULA A. DEIKE
DEPUTY

THE HONORABLE STEVEN G. SCOTT



IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

KERIANN M. KINCAID,

Plaintiff,

vs.

SIGURD A. SKOGLUND and JANE DOE

SKOGLUND, a marital community,

Defendants.

NO.: 98-2-14630-3SEA

ORDER IN LIMINE

~~Proposed~~ ORIGINAL

This matter having come on in open court on the date indicated below before the undersigned judge, the plaintiff having moved in limine for the exclusion of evidence in this case, the court having reviewed the records and files herein, having heard the oral argument of counsel and being fully advised in the premises, it is

HEREBY ORDERED, ADJUDGED AND DECREED that:

Plaintiff's Motion in Limine No. 1 regarding Income Tax is

[granted] [denied] [reserved];

Plaintiff's Motion in Limine No. 2 regarding Evidence not Disclosed in Discovery is

[granted] [denied] [reserved];

Plaintiff's Motion in Limine No. 3 regarding Reference to Motion in Limine is

[granted] [denied] [reserved];

Plaintiff's Motion in Limine No. 4 regarding Failure to Call Witnesses is

[granted] [denied] [reserved];

Plaintiff's Motion in Limine No. 5 regarding Employment of Counsel is

[granted] [denied] [reserved];

ORDER IN LIMINE - 1

EXHIBIT

F

HALLECK H. HODGINS

Attorney at Law
1400 Broadway
SEATTLE, WASHINGTON 98122
TELEPHONE (206) 324-5541

agc

1
2 Plaintiff's Motion in Limine No. 6 regarding The Use of the Term "Independent Medical
3 Examination" is

4 [granted] [denied] [reserved];

5 Plaintiff's Motion in Limine No. 7 regarding Citations is

6 [granted] [denied] [reserved];

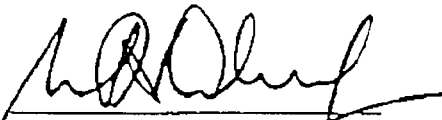
7 Plaintiff's Motion in Limine No. 8 regarding contents of Plaintiff's Labor and Industries file
8 is

9 [granted] [denied] [reserved];

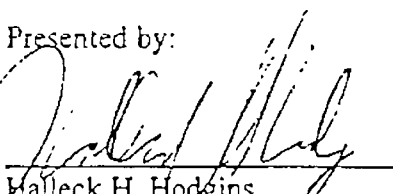
10 Plaintiff's Motion in Limine No. 9 regarding the Exclusion of Testimony by Allen Tencer,
11 Ph.D. is

12 [granted] [denied] [reserved];

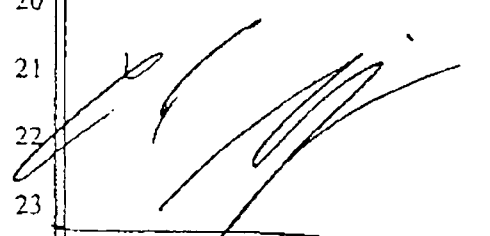
13
14 DONE IN OPEN COURT this 1st day of November, 1999.

15 
16 JUDGE STEVEN G. SCOTT
17 ROBERT ALEDORP

18 Presented by:

19 
20 Halleck H. Hodgins,
21 Attorney for Plaintiff
22 WSBA No. 4287

23 02P47.OI

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25 Charles Siljeg

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IN THE SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

JUAN RAMIREZ and ROSIE RAMIREZ,
individually and as husband and wife and JUAN
RAMIREZ as Guardian Ad Litem for their
minor child, JUAN RAMIREZ, JR.,

Plaintiffs,

v.

JAMES EASLEY and JANE DOE EASLEY,
individually and as husband and wife and the
marital community comprised thereof,

Defendants.

NO. 06-2-12409-8

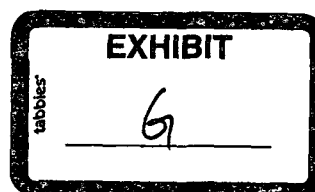
ORDER GRANTING PLAINTIFFS
MOTION IN LIMINE RE EXCLUDING
TESTIMONY FROM DEFENSE
EXPERT ALLAN TENCER

THIS MATTER having come on regularly for hearing before the undersigned judge of the
above entitled court upon the motion of Plaintiff, the court having heard oral argument, having
reviewed the records and files and being duly advised, now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED:

Order Granting Plaintiff's Motion in Limine
Re: Excluding Testimony from Defense
Expert Allan Tencer - 1

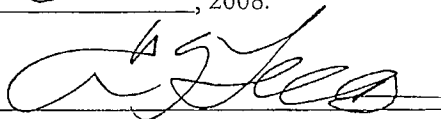
Law Office of Stephen K. Monro, Inc., P.S.
9623 32nd Street S.E., Bldg. C-101
Everett, Washington 98205
(425) 335-3237



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THAT DR. TENCER'S TESTIMONY IS SUPPRESSED
FROM TRIAL.

DATED this 9th day of December, 2008.



Judge

Presented by:

Law Office of Stephen K. Monroe, Inc., P.S.



Stephen K. Monroe, WSBA #26075
Attorney for Plaintiffs


Matthew Kennedy 3646
Attorney For Defendants

Order Granting Plaintiff's Motion in Limine
Re: Excluding Testimony from Defense
Expert Allan Tencer - 2

Law Office of Stephen K. Monroe, Inc., P.S.
9623 32nd Street S.E., Bldg. C-101
Everett, Washington 98205
(425) 335-3237

HONORABLE JUDGE CAROL SCHAPIRA
Hearing Date: Tuesday, October 5, 2010
Without oral argument

RECEIVED

OCT 08 2010

MORAN WINDES & WONG

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING
AT SEATTLE

PATRICIA STEDMAN, a married woman,
individually; DEBRA BRAXTON, a single
woman,

Plaintiff,

vs.

STACEY COOPER and JOHN DOE
COOPER, individually and the marital
community therein,

Defendant.

Case No.: 08-2-35088-6 SEA

ORDER GRANTING MOTION TO
EXCLUDE THE TESTIMONY OF ALLAN
TENCER, PH.D.

THIS MATTER came on regularly before the undersigned Judge of the King
County Superior Court. The Court considered counsels' arguments and the record to
date including the following:

1. Plaintiff's MOTION TO EXCLUDE THE TESTIMONY OF ALLAN
TENCER, PH.D.;
2. DECLARATION OF ANGELA WONG IN SUPPORT OF MOTION TO
EXCLUDE THE TESTIMONY OF ALLAN TENCER, PH.D., with attachments;
3. Defendant's Opposition;

ORDER GRANTING MOTION TO
EXCLUDE THE TESTIMONY OF ALLAN
TENCER, PH.D.
PAGE - 1

ORIGINAL

MWW, PLLC
5608 17th Avenue Northwest
Seattle, Washington 98107
(206) 788-3000
FAX (206) 788-3001

EXHIBIT

tabbies

H

1
2 4. Plaintiff's Reply re MOTION TO EXCLUDE THE TESTIMONY OF ALLAN
3 TENCER, PH.D.;

4 5. _____

5 6. _____

6
7 Based upon the record to date the court is fully advised and hereby grants the
8 motion to exclude the testimony of Dr. Allan Tencer because it is logically irrelevant to
9 the issue the jury must decide: the degree to which these particular plaintiffs were
10 injured in this particular automobile accident. *It is also cumulative of*

11 *other witnesses' descriptions and opinions about the accident.*
12 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiffs' motion

13 to exclude the testimony of Allan Tencer, Ph.D. is GRANTED. Allan Tencer's testimony
14 is excluded. *(except or rebuttal, if "door is opened.")*

15 DONE IN OPEN COURT this 5th day of October, 2010.

16
17 
18 HONORABLE JUDGE CAROL SCHAPIRA

19
20 PRESENTED BY:
21 MORAN WINDES & WONG, PLLC

22 
23 Angela Wong, WSBA 28111
24 Attorneys for Plaintiff

** The court believes the
testimony is valid science
under the Frye test.*


25
ORDER GRANTING MOTION TO
EXCLUDE THE TESTIMONY OF ALLAN
TENCER, PH.D.
PAGE - 2

MWW, PLLC
5608 17th Avenue Northwest
Seattle, Washington 98107
(206) 788-3000
FAX (206) 788-3001

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2
3 **CERTIFICATE OF SERVICE**

4 I hereby certify under penalty of perjury in Washington State that on September
5 24, 2010, the foregoing was sent via regular mail, postage prepaid, to:
6

7 Coreen Wilson
8 WIECK SCHWANZ, PLLC
9 400 112th Ave. NE, Suite 340
10 Bellevue, Washington 98004

11 
12 Andrea Kato
13 MORAN WINDES & WONG, PLLC
14 5608 17th Avenue Northwest
15 Seattle, Washington 98107
16 Telephone: 206.788.3000
17 FAX: 206.788.3001
18
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FILED

JUN 30 2010

S. J. KAGSKI
COUNTY CLERK
SNOHOMISH CO. WASH.

SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

ELIZABETH WERST and ROGER WERST,
and the marital community composed thereof,

Plaintiffs,

v.

TIMOTHY H. MASSEY, M.D., *et al.*,

Defendants.

Case No. 09-2-04004-2

~~PROPOSED~~ ORDER GRANTING
PLAINTIFFS' MOTION *IN LIMINE*

THIS MATTER came before the Court on Plaintiffs' Motion *in Limine* re Testimony of Dr. Massey, Myles Goldflies, M.D., and Allan F. Tencer, PhD. The Court has reviewed the parties' papers and the file herein, and has considered the following pleadings filed in this action:

1. Plaintiffs' Motion *in Limine* re Testimony of Dr. Massey, Myles Goldflies, M.D., and Allan F. Tencer, PhD.;

2. Declaration of Susan Machler in support of Plaintiffs' Motion *in Limine* re Testimony of Dr. Massey, Myles Goldflies, M.D., and Allan F. Tencer, PhD. and attachments thereto;

3. Defendant Massey's Opposition to Plaintiffs' Motion *in Limine* re Testimony of Dr. Massey, Myles Goldflies, M.D., and Allan F. Tencer, PhD.;

PROP. ORDER RE PLS' MOT. *IN LIMINE* - 1

OSBORN MACHLER

2125 Fifth Avenue
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)

EXHIBIT

I

1 4. Declaration of Myles Goldflies, M.D., In Response to Plaintiffs' Motion to
2 Exclude Testimony;

3 5. Declaration of Allan F. Tencer, Ph.D. In Response to Plaintiffs' Motion to
4 Exclude Testimony;

5 6. Plaintiffs' Reply in Support of Plaintiffs' Motion *in Limine* re Testimony of Dr.
6 Massey, Myles Goldflies, M.D., and Allan F. Tencer, PhD; and

7 7. Reply Declaration of Susan Machler in Support of Plaintiffs' Motion *in Limine* re
8 Testimony of Dr. Massey, Myles Goldflies, M.D., and Allan F. Tencer, PhD;

9 Now, Therefore; It Is Hereby,

10 ORDERED, ADJUDGED AND DECREED ^{regarding} that Plaintiffs' Motion *in Limine* re

11 Testimony of Dr. Massey, Myles Goldflies, M.D., and Allan F. Tencer, PhD; ~~is granted~~ as ^{EF}
12 follows:


13 1. The testimony of Allan F. Tencer in its entirety regarding the experiment ^{EF}
14 referenced in his declaration, dated April 30, 2010, is excluded; ^{as the court has concluded that the conditions were not substantially similar to the lawsuit at issue.}

15 2. The opinions or other testimony by Dr. Massey and his other expert, Dr. Myles
16 Goldflies, based upon Tencer's experiment are excluded;

17 3. The testimony and opinions of Dr. Goldflies that plaintiff Elizabeth Werst was not
18 burned, that her medications caused her burn, or that her burn occurred spontaneously are ^{admissible}
19 excluded; and ^{would burn, would burn}

20 4. ^{the testimony of Dr. Goldflies regarding standard of}
21 ~~The testimony and opinions of Dr. Goldflies that Elizabeth Werst's smoking her~~
^{care are admissible}
~~burn are excluded. See Machler Decl., Ex. 3.~~

22 DONE IN OPEN COURT this ^{30th} day of June, 2010.

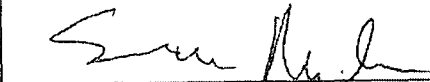

23
24 
25 Honorable Eric Lucas
Snohomish County Superior Court Judge

1 PRESENTED BY:
2 OSBORN MACHLER

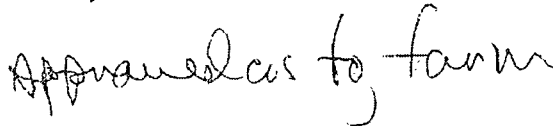
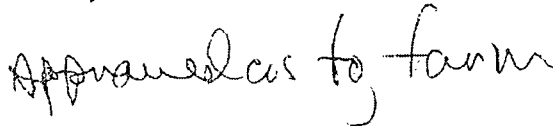
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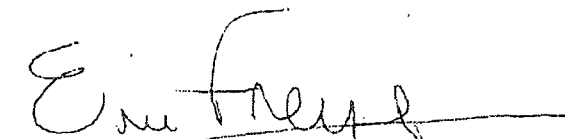
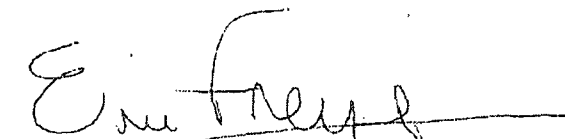
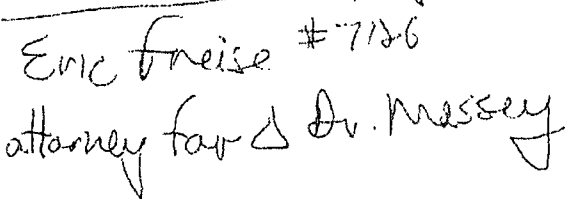
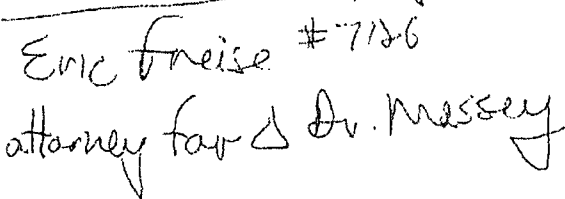
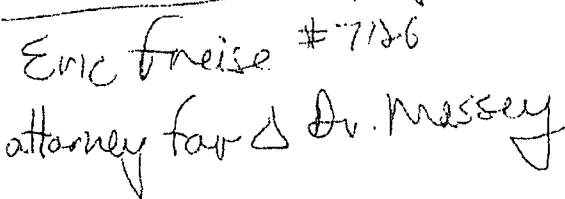
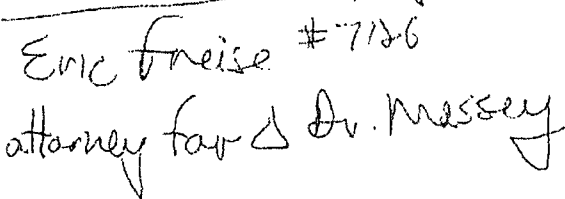
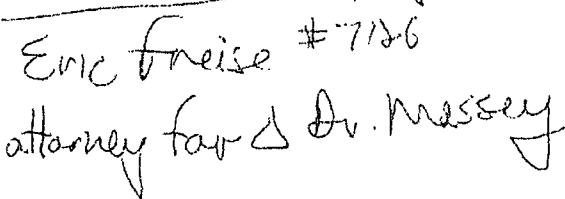
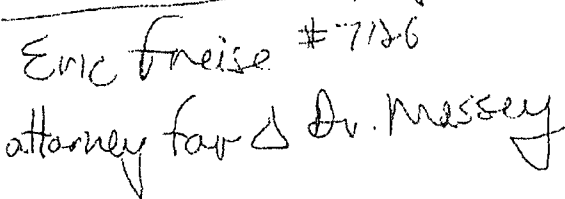
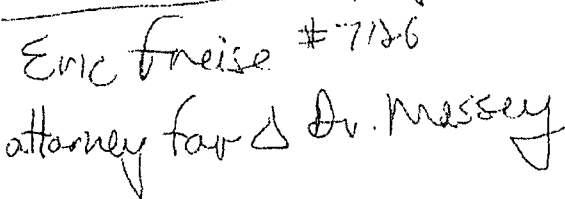
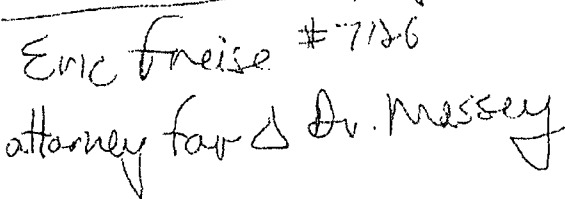
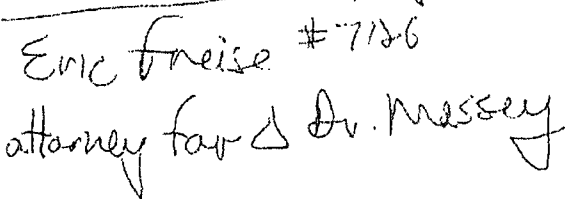
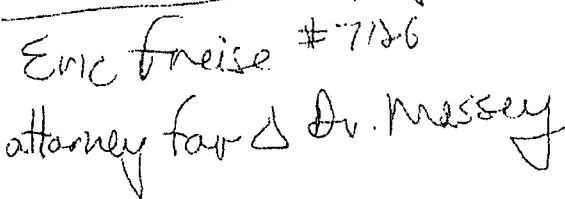
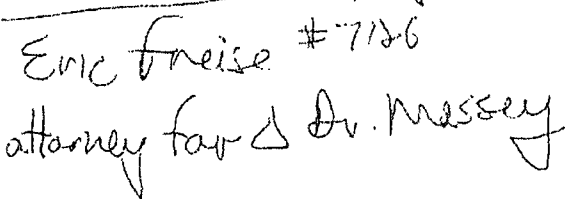
4 Susan Machler, WSBA #23256

5 MW INJURY RESOLUTIONS

6  23256
7 Jean Magladry, WSBA #12988 

8 Attorneys for Plaintiffs

9 
10 

11 
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13 Eric Freise #7156
14 attorney for Dr. Massey
15 
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PROP. ORDER RE PLS' MOT. IN LIMINE - 3

OSBORN MACHLER

2125 Fifth Avenue
Seattle, WA 98121
206-441-4110 (Tel)
206-441-4220 (Fax)